IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 19TH SEPTEMBER 2007 / 28TH BHADRA 1929

CRL.A.No. 882 of 1998(C)

SC.147/1996 of II ADDL.SESSIONS COURT, KOLLAM

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APPELLANTS/ACCUSED 1 TO 5:

1.KAREEM, S/O. KOYAKUNJU, MELATHIL VEEDU,
NEDUMPANA CHERRY, (NOW RESIDING AT
PALLIVADAKKATHIL VEEDU, NEDUMPANA VILLAGE.

2.JAHANGIR @ JAHAN, S/O. NOORMOHAMMED,
PARAVILA; VEEDU, MUTTAKKAVU CHERRY,
KULAPPADAM, NEDUMPANA VILLAGE.

3.NIZAMUDEEN @ NIZAM, S/O. SHAMSUDEEN,
THADAVILA PADINJATTATHIL,
NEDUMPANA VILLAGE.

4.NAZEER, S/O. YOOSUF KUNJU, ASARITHODIYIL VEDU,
KHADI JUNCTION, MUTTAKKAVU CHERRY,
KULAPPADAM, NEDUMPANA VILLAGE.

5.ANWAR BABU @ ANWAR, S/O. ABDUL REHIM,
SALIM NIVAS, NEAR KHADI JUNCTION,
NEDUMPANA CHERRY, NEDUMPANA VILLAGE.

BY ADV. SRI.V.V.RAJA

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 19/09/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ORDER IN CRL. M.P.NO.4273 OF 1998 IN CRL. APPEAL NO. 882 OF 1998.

DISMISSED

19.9.2007 Sd/- (K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO.882 OF 1998

Dated this the19th day of September, 2007

JUDGMENT

This appeal is filed against the judgment in S.C. No.147 of 1996 on the file of the II Additional Sessions Court, Kollam. The appellants along with three others faced trial for the offences punishable under Sections 143, 147, 148, 324, 302 and 307 I.P.C.

2. The prosecution case against the appellants - accused was that on 16.2.1995 at about 11.30 p.m., all the accused formed themselves into an unlawful assembly at Kulappadam with deadly weapons like stick, sword and dagger and when deceased Nazar and PW.2, who were returning from Bathar Mosque after participating in the religious ceremony in connection with Ramzan, reached the place of occurrence, accused No.4 struck on the head of Nazar with a stick as a result of which Nazar fell down, accused No.7 cut just below the right knee joint with a sword, accused No.3 using a dagger stabbed below the right knee of deceased Nazar, accused No.6 cut each foot with a sword and accused Nos.5 and 8 hit him with sticks on different parts of his body. It was further alleged by the prosecution that

on seeing the accused attacking deceased Nazar, PW.2 ran away from the place and accused Nos.1 to 5 and 7 followed him and attacked him with sword and stick. It was also the prosecution case that deceased Nazar and PW.2 sustained injuries as a result of the attack, they were removed to the hospital and Nazar succumbed to the injuries on the same night and PW.2 who sustained serious injuries was referred to the Medical College Hospital, Thiruvananthapuram. The enmity between the accused and deceased Nazar and PW.2, according to the prosecution, was due to the fact that deceased Nazar and PW.2 who were members of Communist Party of India (Marxist) (C.P.I.(M)) of which the accused were also members, left the party and joined Communist Marxist Party (C.M.P.). To prove the case against the accused, the prosecution examined PWs.1 to 14 and produced Exts.P1 to P17 as well as Mos.1 to 13. On the side of the defence, DWs.1 to 4 were examined and Exts.D1 to D17 were produced. On closing the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. All the accused denied the charges levelled against them. Accused No.1 also stated that on the date of the incident, deceased Nazar and PW.2 went to the mosque in a drunken state and quarrelled with the members the committee and that the members of the committee beat them as a result of which they sustained injuries. However, after considering the entire evidence, the trial court found accused No.4 guilty

under Section 304 part II I.P.C., convicted him thereunder and sentenced him to undergo rigorous imprisonment for ten years. The trial court also found accused Nos.1 to 5 guilty under Sections 324 and 326 read with Section 149 I.P.C. and under Section 148 I.P.C., convicted them thereunder and sentenced them each to undergo rigorous imprisonment for five years under Section 326 I.P.C., rigorous imprisonment for two years each under Sections 324 and 148 I.P.C. The sentences were ordered to run concurrently. Accused No.6 who was absconding did not face trial and the case against him was split up. The trial court also found accused Nos.7 and 8 not guilty and they were acquitted of the charges levelled against them. The above conviction and sentences are challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellants as well as the learned Public Prosecutor.

4. The learned counsel appearing for the appellants raised the following contentions in challenging the finding entered and the conclusion arrived at by the trial court: (i) the trial court committed serious error in finding that the appellants committed the offences now found against them on relying on the evidence of PW.2 alone as PWs.3, 4

and 7 were disbelieved by the court (ii) the trial court was not justified in discarding the case set up by the appellants when questioned under Section 313 Cr.P.C. as they had given evidence before the court that the prosecution had not placed the true version before the court, (iii) the trial court ought to have found that Ext.P1 first information statement given by PW.1 was not a true statement and that it was a concocted document prepared after deliberate discussion with the authorities of the political party concerned and (iv) even if the evidence of PW.2 is accepted, the appellants are not liable to be punished for the offences found against them as the medical evidence does not support the prosecution case at all.

5. Before considering the contentions of the learned counsel appearing for the appellant, this Court shall consider the finding of the trial court regarding the motive behind the attack. The prosecution case before the court was that the accused persons, deceased Nazar and PW.2 were members of C.P.I(M) and that deceased Nazar and PW.2 left the party and joined C.M.P. Further, on 22.5.1988, deceased Nazar and PW.2 cut off the right hand of one Kamaruddin. This led to the development of political enmity and the accused were keeping grudge against deceased Nazar and PW.2 and they were looking for a chance to take revenge on deceased Nazar and PW.2. PW.1, the father of deceased Nazar deposed

before the court below that on 16.2.1995 at about 11.45 p.m., PW.3 came to his house and informed about the incident whereupon he and PW.3 rushed to the spot and took deceased Nazar and PW.2 to Upasana Hospital, Kollam where they were admitted. He further stated that at about 1 a.m., Nazar succumbed to the injuries and PW.2 was referred to the Medical College Hospital, Thiruvananthapuram. PW.1 also stated that he gave Ext.P1 first information statement before the Sub Inspector of Police on 17.2.1995 at about 7.30 a.m. Though PW.1 was not an eye witness to the occurrence, he had stated the names of accused Nos.1 to 6 in Ext.P1 and on the basis of the statement given by PW.1, crime was registered against accused Nos.1 to 5 and an unidentified accused. This witness also stated that his son and PW.2 were members of C.P.I.(M) and that they left that party and joined C.M.P. which was the reason behind the attack. During cross-examination this witness admitted that he had no direct knowledge about the change of party and that it was about six years prior to the incident.

6. According to PW.2 who was one of the injured, on the date of the incident at about 4 p.m., he and deceased Nazar went to the shop near the mosque, had tea and then went to the mosque to participate in the religious ceremony. PW.2 stated that all the accused were also present in

the shop and that after participating in the ceremony , they were retuning home with a packet of food (ghee rice) when the incident happened. PW.2 further stated that accused No.4 hit deceased Nazar on his head as a result of which Nazar fell down and that on seeing the attack, he ran away from the place. He further stated that accused Nos.1, 2,4 and 5 chased him and hit him with sticks on different parts of the body. He also stated that accused No.1 hit him on the back side of his head with a stick as a result of which he fell down and accused No.7 inflicted a cut injury on his left hand. This witness further stated that he became unconscious and after a while PW.3, Sahamsudin and PW.1 came to the place of incident with a torch and he and deceased Nazar were taken to Upasana Hospital, Kollam where they were examined by PW.5. This witness further stated that deceased Nazar succumbed to the injuries and that he was referred to the Medical College Hospital, Thiruvananthapuram. PW.2 when cross-examined stated that the incident regarding the attack on Kamaruddin had taken place about nine years back.

7. PWs.3, 4 and 7 were examined as eye witnesses to the occurrence. PW.3 stated that on the date of the incident, he had gone to the mosque and that while he was returning from the mosque, he saw deceased Nazar and PW.2 standing near the shop of Shamsuddin. This

witness further stated that he had seen the appellants and the other accused beating Nazar. He also stated that he had seen accused Nos.1 to 6 beating PW.2. With regard to the political animosity, PW.3 had stated that it was because deceased Nazar and PW.2 had cut off the right hand of Kamaruddin. He also stated that he had no direct knowledge about the incident. PWs.4 and 7 stated that they had seen the second part of the incident in which PW.2 was injured. These two witnesses stated that while they were returning home after attending the ceremony in the mosque, they saw accused Nos.1 to 6 chasing PW.2 and accused No.4 beating PW.2 on his head with a stick as a result of which he fell down and then the other accused inflicting injuries on him. PWs.3 and 4, though spoke about the incident, they stated that they were not aware of the motive behind the attack.

8. The doctor who examined deceased Nazar and PW.2 at Upasana Hospital was examined as PW.5. He stated that deceased Nazar was brought to him in a gasping stage and shock and severe pallor was found at the time of examination. Ext.P2 is the wound certificate issued by PW.5 in respect of deceased Nazar in which the following injuries were noted:

(1)Incised wound in the posterior aspect of (R) knee.

(2)Right knee joint exposed.

(3)Lacerated wound (L) parietal area 8 x 3x bone deep.

(4)Incised wound lateral aspect of (L) foot 5 x 1x cutting bone.

(5)Incised wound Medial aspect of (R) foot 5 x 1 bone deep cutting muscles and tendon.

Ext.P3 is the wound certificate issued by PW.5 in respect of PW.2. The following injuries were noted in Ext.P3:

1) Multiple lacerated wound occipital area (R).

2) Mastoid area 3 x 2 cm. deep.

3) Stan injury left arm with Maematosis with bleeding.

4) Suspected head injury referred to Medical College Hospital, Thiruvananthapuram.

PW.6, the A.R.M.O., District Hospital, Kollam was examined to prove Ext.P4 postmortem certificate issued in respect of deceased Nazar. The following injuries were noted in Ext.P4:

1) Curved incised wound extending from inner aspect of rt. knee to posterior aspect of rt. knee, exposing the knee joint and cutting the bones, muscles, vessels and tendon. Both ends are

sharp.

2) Curved incised wound extending from medial aspect of right foot to sole of rt. foot, 7 x 1 x 1 cm., cutting the muscles and tendon. Both ends are sharp.

3) Curved incised wound on outer aspect of dorsum of (L) foot, 6 x 0.5 x 2 cm., extending downwards to sole of (L) foot, cutting the muscles, tendon and 4th and 5th metalarsel bones. Both ends sharp.

4) Incised would 2 x 1 x 1 cm. in front of upper third of rt. leg medial aspect. Both ends sharp.

5) Lacerated wound 7 x 2cm. x bone deep on (L) tempero parietal area of scalp with fracture of temporal and parietal bones, extending to base of skull to the middle cranial fossa (L) side, with bleeding in subdural and subarachnoid spaces.

6) Abraded contusion 4 x 2cm. on right side of forehead.

7) Abrasion 0.5 x 0.5 cm. on the root of nose.

8) Abrasion 2 x 2 cm. on right side of face, 2 cm. in front of rt. ear.

9) Abrasion 6 x 1 cm. extending from dorsum of rt. wrist of dorsum of rt. hand.

This witness stated that the injuries noted on the body of deceased Nazar could be caused by a weapon like sword and also with sticks. Wit regard to the cause of death, PW.6 opined that Nazar died as a result of haemorrhage and shock due to the multiple injuries sustained by him.

9. PWs.8 and 9 were examined to prove Exts.P5 scene mahazar and Ext.P6 body mahazar respectively. Ext.P7 recovery mahazar was proved by PW.10. PW.11 was the attester of Ext.P8 inquest report and PW.12 was the Village Officer who prepared the scene plan. PW.13 was Assistant Professor, Medical College Hospital, Thiruvananthapuram who proved Ext.P10 discharge certificate of PW.2 and PW.14 was the Circle Inspector of Police who investigated the case.

10. The trial court considered the entire evidence and came to the conclusion that the motive suggested by the prosecution for the attack was not proved. However, the trial court found that since there were eye witnesses to the occurrence, motive behind the attack need not be considered. However, on the background under which the case was set up by the prosecution, motive for the attack requires consideration. From the evidence of PWs.1 to 4 and 7, this Court is not in a position to say that there was any immediate provocation for the appellants - accused to attack deceased Nazar and PW.2. Further, even though PWs.3, 4 and 7 were examined as eye witnesses to the occurrence, a close scrutiny of the evidence of PW.3 would show that he had not actually seen the incident as spoken to by PW.2 or as alleged by the prosecution. The evidence of this

witness would show that he was a co-accused in several cases along with deceased Nazar, PW.2 and PW.7. That apart, even though this witness had stated that he had actually seen the accused inflicting injuries on deceased Nazar and PW.2, it is seen that he had not interfered at any point of time. Such an attitude would create doubt regarding the evidence adduced by him. It has also come out in evidence that he is a close relative of deceased Nazar and yet he had not informed the matter to the police or to PW.1. That being so, the evidence of PW.3 is not free from doubt. Likewise, PWs.4 and 7 were examined by the prosecution to prove that they were present at the place where PW.2 was attacked by the accused. These two witnesses stated that though they had seen the second part of the incident, they kept away as the accused had threatened them. It is also to be noted that PW.4 was a relative of PW.2 and a co-accused in several cases along with deceased Nazar and PW.2. Even PW.7 who is alleged to have witnessed the attack did not interfere when the accused were inflicting injuries on PW.2. This witness also stated that though he knew the names of the accused, he did not reveal their names to the police officer. In the above circumstances, this Court is of the view that the evidence of PWs.3, 4 and 7 cannot be accepted. The versions given by PWs.3, 4 and 7 do not corroborate the evidence of PW.2. In this context, the evidence of PW.1 also has to be analysed. It is seen that in Ext.P1 first

information statement PW.1 had given the names of accused Nos. 1 to 5 and another unidentified accused whose name he later stated as Baiju. This witness had admitted before the court below that he was questioned by the Circle Inspector of Police at the time of preparing Ext.P8 inquest report. It is to be noted that Ext.P8 inquest report was prepared on 17.2.1995 at about 10.30 a.m. and though this witness stated that deceased Nazar and PW.2 were attacked by members of C.P.I.(M), he had not stated the names of any of the accused. PW.1 had admitted in court that PW.2 had given him the names of the accused. In this context, learned counsel appearing for the appellant submits that Ext.P1 is not the real first information statement regarding the case as PW.1 had not stated the names of the accused in Ext.P8 inquest report. That apart, PW.14 had admitted that he had collected the names and addresses of the accused only subsequently. In this regard, the evidence of PW.5 also assumes relevance. This witness had admitted that PW.1, the father of the deceased, had given him the information regarding the history of the injuries on deceased Nazar and PW.2. But the statement recorded by PW.5 does not show the names of any of the accused. Hence, this Court is of the view that the evidence of PW.1 is also not free from doubt.

11. Now, this Court shall analyse the defence evidence. DWs.2

was the owner of a night shop. He stated that deceased Nazar and PW.2 came to his shop at about 10.30 p.m. in a fully drunken state and asked for tea. He also stated that no quarrel took place in front of the shop and that at about 12'O clock at night, he found deceased Nazar and PW.2 lying on the side of the road at Kulappadam. DW.3, a member of the mosque committee stated that deceased Nazar and PW.2 came to the mosque in a drunken state and that they were sent out of the compound. He further stated that at about 10.30 p.m., deceased Nazar and PW.2 again came to the mosque with a sword and started quarrelling with the members regarding distribution of food and while they were being sent out of the compound somebody attacked them and they sustained injuries. But, this evidence was not considered by the trial court.

12. Another point to be noted is that there were no street lights at the junction as the lights were switched off on account of load shedding. This is clear from the evidence of DW.1, the Assistant Engineer, Electrical Section, Kannanalloor. DW.4, the Lineman in charge of Kulappadam stated that there was no central light at Kulappadam on the date of the incident as the light was switched off by him at 10.30 p.m. The learned trial Judge had not considered the evidence of DWs.1 and 4 to see whether there were street lights at the place of incident during the relevant time.

Though the evidence of PW.14 would disclose that there were street lights at the place where PW.2 was attacked, it is not clear whether at the relevant time, the street lights were switched off or not. PWs.3 and 4 had also stated that they had seen the incident in the moon light and also from the light which came from the night shops. The prosecution had not adduced any evidence to show that there were street lights at the place of incident during the relevant time.

13. This Court discussed the evidence of PW.2 and came to the conclusion that the motive suggested by the prosecution and as spoken to by PW.2 is also not proved by the prosecution. This Court also found that the evidence of PWs.3, 4 and 7 is not acceptable in proving the prosecution case and that the trial court found that these witnesses were not actually eye witnesses to the occurrence. Further, this Court considered the case set up by the appellants when they were questioned under Section 313 Cr.P.C. Though the trial court did not consider the case of the appellants, in the light of the contention raised by the appellants in this appeal that the prosecution had not placed the true facts before the trial court, the case set up by them assumes relevance, especially when the evidence of PW.2 is considered. This Court has already found that the prosecution had not succeeded in proving that there

was enough light at the junction where the first part of the attack took place for PW.2 to see the incident. The second part of the incident had taken place at bout 83 metres away from the junction. Further, PW.2 had a definite case that he ran away from the place of occurrence on seeing accused No.4 attacking deceased Nazar. If so, this witness was not in a position to see what had actually happened at the first stage of the incident. That apart, PW.1 had a case before the court that while PW.2 and deceased Nazar were being taken to the hospital, PW.2 had stated the names of the assailants to him. It is seen that PW.2 had no such case and that shows that the evidence of PW.2 regarding the incident is also not free from doubt. In the light of the findings entered by this Court regarding the motive for the attack and the evidence of PWs.3, 4 and 7 and also the lack of street lights at the place of occurrence, this Court is of the view that the evidence of PW.2 does not give confidence to hold that the prosecution succeeded in proving the case against the appellants beyond reasonable doubt. The appellants are, therefore, entitled to the benefit of doubt.

14. Yet another pointed to be considered is regarding the case of the prosecution that the accused attacked deceased Nazar and PW.2 in furtherance of a common object. The prosecution has not adduced any evidence to show that the accused came to the place of occurrence with

any common object of attacking deceased Nazar and PW.2.

15. The trial court also found that the recovery evidence produced by the prosecution cannot be relied on. PW.10 was the only attesting witness to Ext.P7 recovery mahazar. This witness is reported to be a police witness in all cases. Hence, the evidence of this witness cannot be believed. Apart from this infirmity, Ext.P7 recovery mahazar also is doubtful as the evidence of PW.14 that the material objects were recovered on the basis of the statement given by accused No.3 under Section 27of the Indian Evidence Act,1872 was not proved.

16. In the light of the discussion made above, this Court is of the view that the finding of the trial court that the prosecution succeeded in proving the case against the appellants is not sustainable. The judgment of the trial court is accordingly set aside. The appellants are found not guilty and they are acquitted of the charges levelled against them.

The Crl. Appeal is accordingly allowed. The bail bonds executed by the appellants shall stand cancelled.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.882/1998

JUDGMENT

19th SEPTEMBER, 2007